

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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DOMINIC ANTHONY MORROCCO,

Plaintiffs,

vs.

MARK A. HILL and MARCELLOUS McZEAL

Defendants.

2:12-cv-00028-JCM-NJK

**ORDER**

This matter came before the Court on a hearing on Plaintiff's Countermotion to Compel Discovery (#35). The Court has considered the Plaintiff's Motion (#35), the Defendants' Opposition (#36), and the Plaintiffs Reply (#34), as well as the arguments and representations made by counsel at the August 21, 2012, hearing.

**BACKGROUND**

This case arose out of an allegedly improperly filed *lis pendens*. The Defendants filed the disputed *lis pendens* on three of the Plaintiff's Nevada properties in order to notice persons interested in those properties of pending litigation in Texas. According to the Defendants, the Texas litigation may result in the Plaintiff incurring a substantial judgment against him. The Texas litigation is a suit between the Plaintiff, who is the defendant in that case, and Defendant Mark Hill, who is represented by Defendant Marcellous McZeal in that matter. In this case, the Plaintiff has sued the Defendants for improperly filing the *lis pendens*.

The present dispute in this case arises out of the Defendants' alleged failure to properly respond to discovery requests. On April 18, 2012, the Plaintiff served the Defendants with his First

1 Discovery Requests. The Defendants provided their responses to requests for admission on May  
 2 21, 2012, and the interrogatories on May 25, 2012. The Plaintiff argues that the Defendants'  
 3 responses were inadequate and additionally, the Defendants waived any privilege because they  
 4 failed to provide a privilege log.

### 5 DISCUSSION

6 When a party fails to respond to written discovery, “the discovering party may move for an  
 7 order compelling an answer . . . in accordance with the request.” Fed.R.Civ.P. 37 (a)(2)(B). Here,  
 8 pursuant to Federal Rule of Civil Procedure 37(a), Defendant seeks an order compelling responses  
 9 to Interrogatories Nos. 2, 4-6, 8-15; Requests for Production of Documents Nos. 1-8; and Requests  
 10 for Admission Nos. 2, 3, 5, 10, and 11. Specifically, the Plaintiff is seeking more complete  
 11 responses to his requests. He asserts that the Defendants’ responses and objections were evasive,  
 12 frivolous and baseless. In response, the Defendants contend that the requests are seeking irrelevant  
 13 and privileged information and their objections are proper. Importantly, the Defendants did not  
 14 provide a privilege log to the Plaintiff regarding information they claim is non-discoverable due to  
 15 privilege.

#### 16 **A. Disputed Discovery Requests**

##### 17 1. Interrogatories

18 A party answering interrogatories must furnish “such information as is available to the  
 19 party.” Fed.R.Civ.P. 33(a). Rule 33(b)(1) requires an interrogatory to be answered “fully in writing  
 20 under oath...” Fed.R.Civ.P. 33(b)(1). Parties must provide “true, explicit, responsive, complete,  
 21 and candid answers to interrogatories.” *Anderson v. Fresno County, Human Services Sys.*, 2007  
 22 WL 1865657, \*3 (E.D. Cal. June 28, 2007)(citing *Hansel v. Shell Oil Corp.*, 169 F.R.D. 303, 305  
 23 (E.D.Pa.1996)). Therefore, an answer to an interrogatory must respond to the question being asked.  
 24 *Id.*

25 Here, the Defendants argue that the disputed interrogatories involve the separate litigation  
 26 in Texas which is not relevant to the present case. However, in their response to Request for  
 27 Admission No. 10, the Defendants state, “the Texas Action can affect the title or possession of the  
 28 real property described in the *lis pendens*, together with the real possibility that the claims may

1 never affect the title or possession of the real property described in the *lis pendens*.” Countermotion  
2 to Compel (#35) at 22. Thus, the Defendants admit that the Texas litigation is connected to the *lis*  
3 *pendens* at issue in this case and its outcome affects the title and possession of the real property  
4 described in the *lis pendens*. The Defendants’ objection is based on the possibility they will not be  
5 successful in the Texas Litigation. This is not a proper objection. The present dispute clearly has  
6 a relevant connection to the Texas litigation. Accordingly, and having reviewed the interrogatories,  
7 the Court finds the requested information is relevant. Additionally, the Court has reviewed the  
8 responses to the interrogatories and finds them wholly deficient. As an example, the response to  
9 Interrogatory No. 4 states, “Huh? Objection.” Accordingly, based on good cause appearing  
10 therefore, the Court finds that the Plaintiff is entitled to proper responses from the Defendants to  
11 the disputed interrogatories.

12 2. Requests for Production

13 Federal Rule of Civil Procedure 34 permits parties to request production of documents in  
14 the “possession, custody, or control” of the responding party. Here, the Plaintiff has requested  
15 documents which the Defendants concede are in their possession. However, the Defendants failed  
16 to produce any documents on the grounds that the requests are irrelevant, burdensome, and  
17 harassing. Having reviewed the requests, the Court, with good cause appearing therefore, finds that  
18 the requests are neither burdensome nor harassing. Rather, had the Defendants provided a proper  
19 privilege log, responding to the requests would have been quite routine. Additionally, the requests  
20 are relevant for the same reason the interrogatories are relevant.

21 3. Requests for Admission

22 Under Fed.R.Civ.P. 36(A)(4)

23 If a matter is not admitted, the answer must specifically deny it or state in detail why the  
24 answering party cannot truthfully admit or deny it. A denial must fairly respond to the  
25 substance of the matter; and when good faith requires that a party qualify an answer or deny  
26 only a part of a matter, the answer must specify the part admitted and qualify or deny the  
rest. The answering party may assert lack of knowledge or information as a reason for  
failing to admit or deny only if the party states that it has made reasonable inquiry and that  
the information it knows or can readily obtain is insufficient to enable it to admit or deny.

27 Here, the parties dispute the Defendants’ responses to Requests for Admission Nos. 2, 3,  
28 5, 10, and 11. In their response to Request for Admission No. 5, the Defendants attempt to play

1 word games and fail to properly answer the question. The Request for Admission is clear and a  
2 proper answer is due. As for the remaining Requests for Admission, the Defendants assert  
3 privilege, but have failed to provide a privilege log. Such privileges are asserted in the responses  
4 to Interrogatories and Requests for Production as well and will be discussed below.

5 **B. Privilege**

6 Many of the Defendants' responses to the discovery requests asserted that the requested  
7 information was privileged. For example, the Defendants' answer to Interrogatory No. 9 stated,  
8 "Any communication or lack of communication with my attorney is subject to the attorney/client  
9 privilege." Countermotion (#35) at 13. Additionally, in response to Request for Production No. 2,  
10 the Defendants stated that the requested documents were protected, privileged, and confidential. *Id.*  
11 at 26. However, despite these numerous assertions of privilege, the Defendants have completely  
12 failed to provide a privilege log.

13 Fed.R.Civ.P. 26(b)(3), protects "the mental impressions, conclusions, opinions, or legal  
14 theories of an attorney or other representative of a party concerning the litigation." *U.S.*  
15 *E.E.O.C. v. Bill Heard Chevrolet Corp.*, 2009 WL 2489282 (D. NV 2009); *Hickman v. Taylor*,  
16 329 U.S. 495 (1947). The party asserting the privilege must "describe the nature of the  
17 documents, communications, or tangible things not produced or disclosed—and do so in a  
18 manner that, without revealing information itself privileged or protected, will enable other  
19 parties to assess the claim." Fed. R. Civ. P. 26(b)(5). "[A] lawyer need not be involved at all for  
20 the work product protection to take effect." *Goff, supra*, 240 F.R.D. at 660 (citations and  
21 internal quotations omitted).

22 In this case, the Defendants have failed to provide a privilege log. Thus, it is impossible  
23 for the Plaintiff or Court to assess the Defendants' assertion that certain communications are  
24 privileged. As the Defendants acknowledged at the hearing, no federal rule nor case law  
25 supports the assertion that all communications and documents exchanged between a party and  
26 counsel are *de facto* privileged. Additionally, if a party withholds documents it contends are  
27 privileged, it must always provide a privilege log to support that assertion. Fed. R. Civ. P.  
28

1 26(b)(5).

2 Thus, as discussed at the hearing, the Court has grounds to find that the Defendants have  
3 waived their assertion of privilege. However, having reviewed all the requests, the Court finds  
4 that ordering the Defendants to provide a privilege log at this point in the case may be less  
5 burdensome on both partes. A proper privilege log will allow the Plaintiff to receive, and the  
6 Defendants to provide, proper responses to all discovery requests as promptly as possible, which  
7 will help move this case forward. Accordingly, the Defendants have seven days from the  
8 signing of this Order to provide a proper privilege log, produce documents, respond to  
9 interrogatories and respond to requests for admission.

10 If, after the Defendants provide a privilege log, the parties wish to bring this dispute  
11 before the Court again, they must meet and confer before doing so.<sup>1</sup>

12 The privilege log shall reveal the identity and position of all senders/creators and  
13 addressees/recipients. Defendants shall provide a description of each communication or  
14 document withheld with sufficient detail that the Plaintiff can readily assess the claim of  
15 privilege. Although “strategy” or the detailed substance of the subject communications need not  
16 be disclosed, Defendants must provide a description of the general topic that is detailed enough  
17 that the Plaintiff can ascertain whether the communication is truly privileged. This is especially  
18 important where the communications are among non-attorneys, and it is entirely unclear from  
19 the record whether these communications were in furtherance of an attorney-client  
20 communication or in response to a query by the Defendants’ attorney.

21 **C. Sanctions**

22  
23 The Plaintiff has requested costs and fees associated with its Countermotion to Compel.  
24 This includes costs and fees associated with opposing the Defendants’ Motion for Protective  
25 Order (#30). Fed.R.Civ.P 37(a)(5)(A) provides that where a party’s motion to compel is

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27 <sup>1</sup>Although the Court defers ordering disclosure of all the requested documents as requested  
28 by the Plaintiff, the Court may consider that measure if the Defendants fail to comply with the Court  
Order to provide a sufficient privilege log to the Plaintiff.

1 granted, the moving party is entitled to “reasonable expenses incurred in making the motion,  
2 including attorney’s fees.” Fed.R.Civ.P 37(a)(5)(A). Accordingly, the Plaintiff’s request for  
3 costs and fees associated with the Countermotion to Compel, is granted. The Court encourages  
4 the parties to meet and confer and reach an agreement on the appropriate amount for this  
5 sanction. The deadline for the Plaintiff to submit an affidavit of costs and fees is January 31,  
6 2013, and the Defendants’ responses are due February 7, 2012.

7  
8 **ORDER**

9 Based on the foregoing, and good cause appearing therefore,

10 IT IS HEREBY ORDERED that Plaintiff’s Countermotion to Compel Discovery (#35)  
11 is **GRANTED**.

12 IT IS FURTHER ORDERED that the Defendants must provide a proper privilege log  
13 and properly respond to the Plaintiff’s Requests for Production, Interrogatories, and Requests  
14 for Admission within seven (7) days of this Order.

15 IT IS FURTHER ORDERED that Plaintiffs’ request for costs and fees associated with  
16 bringing the Countermotion to Compel (#35) is **GRANTED**.

17 IT IS FURTHER ORDERED that the deadline for the Plaintiff to submit an affidavit of  
18 costs and fees is January 31, 2013, and the Defendants Respond are due by February 7, 2013.

19 DATED this 24<sup>th</sup> day of January, 2013.

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24 NANCY J. KOPPE  
25 United States Magistrate Judge  
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